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Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in this country, Congress structured a tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance type benefits are provided to injured workers. No-fault workers' compensation systems now cover all other industries and workers except railroad employees and seamen.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. AAR's members expend substantial sums of money defending FELA claims and suits and in the payment of FELA settlements and verdicts, far more, by any reasonable standard of comparison, than is spent by other industries in connection with compensating employees for work related injuries.[2]

The Second Circuit's decision in *Buckley* v. *Metro-North Commuter Railroad*, 79 F.3d 1337 (2d Cir. 1996), is of particular concern to AAR's members. The ruling below circumvents the carefully crafted limits on liability in emotional injury cases established by this Court in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), and opens the door to an entirely new class of FELA claims. As a result, it exposes railroads to the

[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688.

[2] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 2-2 (May 1996) (CLAIM & LITIGATION REPORT). Over the past five years, AAR members have spent, on average, $1.2 billion on FELA annually, or about 3.7 per cent of their gross revenues. CLAIM & LITIGATION REPORT (calendar years 1991, 1992, 1993, 1994, 1995).

potential for far greater liability than was intended under FELA as interpreted by this Court.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

SUMMARY OF THE ARGUMENT

In *Gottshall*, this Court recognized a cause of action for negligent infliction of emotional distress under FELA, but held that it was available only in the limited circumstances when the plaintiff satisfies the common law zone of danger test. In *Buckley*, the court ruled that a railroad employee who was exposed to asbestos on the job may maintain a cause of action for negligent infliction of emotional distress under FELA despite the fact that he has no asbestos-related disease, displays no clinical evidence of physical injury, and was exposed to no immediate risk of physical injury. This ruling seriously misreads and misapplies *Gottshall*.

Under the zone of danger test, in order to recover, the plaintiff's emotional distress must arise as a result of being placed in imminent risk of physical harm. Buckley's alleged distress did not arise from such circumstances, but rather as a result of exposure to an environmental condition that did not create the risk of imminent harm, and, at most, resulted in a slightly increased risk of some future harm. Moreover, there was no evidence that Buckley suffered from any present physical injury. Common law courts have held, with near unanimity, that under the zone of danger test, or any other legal theory, there is no cause of action for negligent infliction of emotional distress based on exposure to an allegedly harmful environmental condition in the absence of present physical injury as a result of such exposure.

If allowed to stand, *Buckley* will significantly and improperly expand railroad liability under FELA. While

the Second Circuit purported to limit its decision to the particular circumstances of the plaintiff's case, it enunciated no principles offering guidance as to when a claim for negligent infliction of emotional distress, alleged as a result of a workplace exposure, would be cognizable. To the contrary, its holding is a prescription for virtually unlimited liability.

Nor would *Buckley* be limited to cases where exposure to asbestos is alleged. In addition to thousands of FELA claims alleging exposure to asbestos that have been filed by rail employees, in recent years rail employees have filed approximately two thousand FELA claims alleging exposure to other substances or environmental conditions in the workplace that allegedly cause future ill health effects, such as diesel exhaust, silica dust and solvents. Under *Buckley*, whether or not they have symptoms, these employees would all be in a position to assert that the railroad is liable for damages for emotional distress they suffer over the prospect of future illness. If *Buckley* is overruled, however, all of these employees will continue to have a remedy for damages under FELA should they eventually develop an injury or disease as a result of such exposure.

ARGUMENT

I. THE SECOND CIRCUIT MISAPPLIED *GOTTSHALL* AND THE ZONE OF DANGER TEST

The Second Circuit ruled that a railroad employee who was exposed to asbestos on the job may maintain a cause of action for negligent infliction of emotional distress under FELA despite the fact that he has no asbestos-related disease, displays no clinical evidence of physical injury, and was exposed to no immediate risk of physical injury. 79 F.3d 1337 (1996). This ruling seriously misreads and misapplies this Court's decision in *Gottshall*, rendering FELA a statute devoid of any recognizable standard, and dramatically expanding railroads' liability

for non-physical injuries. By this ruling, the Second Circuit flings wide open the door to "unpredictable and infinite liability" this Court closed in *Gottshall*. *See Gottshall*, 114 S. Ct. at 2411.

A. Gottshall Placed Substantial Limits on Recovery for Negligent Infliction of Emotional Distress Under FELA

In *Gottshall*, this Court acknowledged that a cause of action for negligent infliction of emotional distress could exist under FELA, but held that the common law and the statutory context of FELA placed substantial limitations on the circumstances under which such a cause of action is available. The Court adopted from the common law the bright line zone of danger test as most compatible with FELA's historic emphasis on physical injuries. The Court described the test as follows:

> [A] worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries—physical and emotional—caused by the negligent conduct of their employers that threatens them imminently with physical impact. This rule will further Congress' goal in enacting [FELA] of alleviating the physical dangers of railroading. 114 S. Ct. at 2410-11.

The Court explained what the test meant: "[t]hat is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.'" *Id.* at 2406 (quoting Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 489 (1982)).

The zone of danger test permits those who are imminently threatened with physical injury from an accident, i.e., are in the zone of danger, to recover for the emo-

tional distress caused by the accident. This Court stressed in *Gottshall* that the bright line zone of danger test was necessary because, unlike claims for physical injuries that present objective, identifiable harms, emotional distress claims present "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Gottshall*, 114 S. Ct. at 2411. Restricting recovery to plaintiffs in the zone of danger, as defined by courts at common law, is consistent with both FELA's focus on the physical dangers of railroading and the important policies, acknowledged by this Court, that call for limitations on the tort of negligent infliction of emotional distress. *Id.* Plaintiffs who come within the zone of danger, are less likely to assert trivial or fraudulent claims; moreover, permitting claims by such plaintiffs will not raise the specter of unlimited and unpredictable liability. *Id.* Where the plaintiff is outside the zone of danger, the right to recover for negligent infliction of emotional distress is cut off in order to advance these important goals. *Id.*

Gottshall adopted a well established common law test for claims of negligent infliction of emotional distress under FELA. Cases at common law clearly establish that plaintiffs, like plaintiff in the case at bar, who allege exposure to a deleterious substance which *may*, at some future time, result in a compensable injury, do not fall within the traditional zone of danger test. Such plaintiffs are not put in imminent risk of physical harm, and they experience no fright or distress that arises due to a near miss.[3] In sharp contrast to plaintiffs coming within the zone of danger, in these cases the alleged distress appears some time after the alleged exposure, in some case many years, when the plaintiff learns of facts suggesting that an

[3] In *Gottshall*, the Court took note of the rationale for the zone of danger test: that "a near miss may be just as frightening as a direct hit." 114 S. Ct. at 2406.

injury may occur at some future time, causing the plaintiff to become distressed.

Nonetheless, the Second Circuit held that Buckley experienced a "physical impact" sufficient to satisfy the zone of danger test, identifying that "physical impact" as Buckley's exposure to asbestos. *Buckley*, 79 F.3d at 1343. Yet, as the court acknowledged, and as Buckley's own doctors testified, that "impact" did not result in any physical injury or in any clinical manifestation of asbestos exposure, and gave rise to at most a minimal increased risk that Buckley would develop an asbestos-related illness. *See id.* at 1343-44. The Second Circuit's unprecedented notion of "physical impact," under which it justified recovery for emotional distress, consisted of an environmental condition that did not manifest itself in physical injury, that did not place the plaintiff at risk of imminent physical injury, and that did not cause him to fear imminent physical injury.[4] "Such an encompassing definition of impact would undercut th[is] Court's desire to draw reasonable limits to employer liability for emotional distress

[4] Under the common law, "impact" for purposes of the zone of danger test is a "violent physical contact, a striking together, a collision." *Williams v. Baker*, 572 A.2d 1062, 1064 n.8 (D.C. 1990); *see also Mitchell v. Hadl*, 816 S.W.2d 183, 184 (Ky. 1991) ("physical contact"); *OB-GYN Assocs. v. Littleton*, 386 S.E.2d 146, 148 (Ga. 1989) ("actual bodily contact"). Thus, common law courts applying the zone of danger test generally permit only those plaintiffs involved in or threatened with traumatic impact-producing accidents to recover for emotional distress. *See, e.g., Dobelle v. National R.R. Passenger Corp.*, 628 F. Supp. 1518, 1521, 1525 (S.D.N.Y. 1986) (fifteen-foot section of steel rail that struck and penetrated passenger train); *Keck v. Jackson*, 593 P.2d 668, 668-70 (Ariz. 1979) (automobile accident); *Towns v. Anderson*, 579 P.2d 1163, 1165 (Colo. 1978) (en banc) (gas explosion that lifted house off its foundation); *see also Niederman v. Brodsky*, 261 A.2d 84, 90 (Pa. 1970) (plaintiff may recover for emotional distress under zone of danger theory only if he "was in personal danger of physical impact because of the direction of a negligent force against him and [he] actually did fear the physical impact").

claims." *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530, 535 (3d Cir. 1995), *on remand from* 114 S. Ct. 2396 (1994).

Exposure to environmental conditions in the workplace typically does not satisfy the zone of danger test because it does not involve an "immediate risk of physical harm." *See Garcia v. Burlington Northern R.R. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (under *Gottshall*, zone of danger "is a location in which the plaintiff is 'at immediate risk of physical harm' ") (citations omitted); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (plaintiff not in zone of danger when near worker who had punched other workers because "threat of injury" to plaintiff "was not immediate" but was "both speculative and remote"); *see also Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 78-79 (3d Cir. 1991) (railroad worker outside the zone of danger—a mile away from train collision—could not recover for fright and emotional distress); *cf. Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996) ("cases which base recovery upon an 'impact' rather than an injury involve plaintiffs who have witnessed a traumatic physical injury to [another]" and "are not analogous" to asbestos exposure cases where "no physical injury to any party has been established").

In short, if the *Buckley* decision is permitted to stand, the clear limits and finite range of the zone of danger test will be lost, and the rule of law established will be equivalent to that expressly rejected by this Court in *Gottshall*.

B. FELA Must Be Guided by Common Law Precedent, Which Does Not Support the Second Circuit's Ruling

Gottshall makes clear that common law principles must guide lower courts' application of FELA. Although it

is considered a broad remedial statute, FELA does not float freely, adrift from all precedent. Rather, as this Court made abundantly clear in *Gottshall*, interpretations of FELA must be guided by the common law. The Second Circuit's fundamental error was that it ignored common law precedents in order to effectuate its exceedingly broad and mistaken construction of FELA's "remedial" purpose, precisely what this Court admonished must not be done. 114 S. Ct. at 2408.[5]

While there has been a tendency to interpret FELA expansively to effectuate its remedial purpose, this Court has admonished that such interpretations are limited by the statute's language and construction. *Id.* In enacting FELA in 1908, and in subsequent amendments, Congress lowered the then existing common law barriers to recovery by abrogating the defenses of assumption of the risk, the fellow servant doctrine and contributory negligence.[6] However, this Court has been equally clear that where Congress has not specifically altered the common law, it is common law concepts that guide the inquiry. "The 'merit' of a FELA claim of this type cannot be ascertained without reference to the common law." *Id.*[7] For example, in

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[5] The Second Circuit cited only three common law cases to support its ruling, *Hagerty v. L&L Marine Servs., Inc.*, 788 F.2d 315 (5th Cir. 1986); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (C.P. Ohio 1987) and *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983), two of which are clearly distinguishable because the plaintiff suffered a physical injury (*Hagerty* and *Lavelle*), and the other of which was disavowed by subsequent case law in the jurisdiction (*Wetherill*).

[6] 45 U.S.C. § 53 (contributory negligence); 45 U.S.C. § 54 (assumption of the risk); *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) (FELA abrogated the common law fellow servant doctrine.).

[7] In her dissent in *Gottshall*, Justice Ginsburg pointed out that the common law test adopted by the court was not universal, noting that there is no unitary common law, but rather that states have adopted different rules to address tort liability. 114 S. Ct. at 2418.

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988), the Court declined to find that prejudgment interest was available under FELA, reasoning that Congress had not explicitly provided for it and that it generally was not recognized at common law when FELA was enacted.[8]

Common law precedent confirms that there is no cause of action for negligent infliction of emotional distress under these circumstances. Courts frequently have considered—and rejected—claims for negligent infliction of emotional distress arising from exposure to harmful substances where there is no evidence of any physical injury or illness. These cases have overwhelmingly held that occupational exposure does not satisfy the zone of danger test because there is no traumatic accident, no immediate physical injury, no fear of imminent physical injury, and no imminent risk of disease. *See, e.g., Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 592 (5th Cir. 1986) (Louisiana law); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985) (Pennsylvania law); *Nutt, v. A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983), *affd*, 480 A.2d 647 (Del. 1984) (Delaware law).

Indeed, whether applying the zone of danger or any other test, federal and state courts applying state common law are virtually unanimous in holding that occupational exposure such as that at issue here, without present physical injury or the substantial likelihood of developing a

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While it is true that the zone of danger test is not followed in all states, the ruling of the Second Circuit is nowhere the law.

[8] Just last term this Court refused to give FELA an expansive interpretation simply to assure recovery when such an interpretation was not supported by the statute. *Norfolk & Western Ry. Co. v. Hiles*, 116 S. Ct. 890 (1996) (a misaligned drawbar does not constitute a violation of the Safety Appliance Act which would result in liability as a matter of law under FELA).

disease in the future, cannot support a claim for negligent infliction of emotional distress. *See, e.g., Ball v. Joy Techs., Inc.*, 958 F.2d 36, 38 (4th Cir.) (no recovery under Virginia law for negligent infliction of emotional distress because "mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle plaintiffs to recover for their emotional distress"), *cert. denied*, 502 U.S. 1033 (1992); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (New Jersey and Pennsylvania law) (no recovery for negligent infliction of emotional distress absent physical injury caused by asbestos exposure or physical manifestation of the feared disease); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (no cause of action for emotional distress based on asbestos exposure in the absence of actual compensable harm); *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112, 114 (M.D. La. 1988) (requiring present PCB-related injury as predicate to recovery for mental anguish arising from exposure to PCBs), *aff'd*, 872 F.2d 422 (5th Cir. 1989); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987) (no recovery for emotional distress and fear of cancer for plaintiffs with no asbestos-related disease, because "[j]ustice would not be done either to the plaintiffs or the defendants by allowing a suit prior to manifestation of any physical injuries or disease"), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984) (in asbestos exposure case, present physical injury required in order to state claim for mental anguish); *Doner v. Ed Adams Contracting, Inc.*, 617 N.Y.S.2d 565, 566 (N.Y. App. Div. 1994) (denying recovery for emotional distress to plaintiff exposed to asbestos who did not show likelihood of contracting disease as result of exposure); *see also Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 848 (3d Cir. 1995) (Pennsylvania law) (no recovery for emo-

tional distress for uninjured plaintiffs exposed to toxic wastes in soccer field that was formerly a landfill), *cert. denied*, 116 S. Ct. 772 (1996); *cf. Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 904-05 (Va. 1981) (in determining whether suit was timely filed, court opines that action for cancer arising from asbestos exposure does not accrue until plaintiff suffers actual physical harm; "legally and medically there was no injury upon inhalation of defendants' asbestos fibers").

There simply is no basis for ignoring the overwhelming case law in order to provide an unprecedented and unique remedy to rail employees.

II. THE SECOND CIRCUIT'S UNPRECEDENTED DECISION WILL HAVE A SIGNIFICANT IMPACT ON THE RAILROAD INDUSTRY

The likely consequence of the Second Circuit's decision in *Buckley* is that thousands of perfectly healthy railroad employees will be able to bring a heretofore unrecognized FELA claim based only on their concern that at some future time they might contract a disease. While it is difficult to predict how various state and federal courts will handle this new form of case, significantly, the *Buckley* decision offers no principles to guide future courts. Nor does it offer any basis by which liability might be predicted or limited.

A. The Second Circuit's Decision Establishes No Standards By Which To Limit Future Claims

The Second Circuit attempted to downplay its expansive and unwarranted interpretation of the zone of danger test by suggesting that *Buckley* was an unusual case, and its holding was thereby very limited. Under the Second Circuit's decision in *Buckley*, the only limit on the recovery of damages for emotional distress arising out of occupation exposure is that workers exposure be "massive, lengthy, and tangible." *Buckley*, 79 F.3d at 1345. This

kind of informal and unscientific assessment hardly affords an objective standard for determining whether a claim may proceed to trial. (In fact, the record in *Buckley* shows undisputably that there was no objective evidence documenting the level or quantum of plaintiff's exposure.) This Court's adoption of the zone of danger test in *Gottshall* expressly was predicated on the Court's rejection of such subjective types of standards and of the concomitant liability. *Gottshall*, 114 S. Ct. at 2408-09; *see also id.* at 2409 (warning that under such fact-specific tests, "[j]udges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts").

Under *Buckley*, if any medical or scientific evidence can be proffered showing a possible link between a substance or environmental condition and future harm, any rail employee who alleges what he or she thinks is substantial exposure to such a substance or condition and claims to be upset as a result would state a prima facie case. *Buckley* offers no rational way to determine what level, dose or duration of exposure would be necessary to support a claim.[9] In fact, the court actually dispensed with any requirement that there be any objective way to determine what level of exposure has occurred.[10] As a result, the plaintiff's testimony as to the level of exposure and a doctor's opinion, based on such testimony, that there exists a small increased risk of future illness might suffice to raise a triable issue on a claim of negligent in-

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[9] The levels of exposure associated with a risk of developing different conditions can differ. *See In Re Hawaii*, 734 F. Supp. at 1566 n.3.

[10] The court termed Buckley's exposure "massive," while acknowledging that there were no "verifiable clinical signs of asbestos exposure." 79 F.3d at 1344. *See also* Joint Appendix at 196 (plaintiff's expert testifying that Buckley had no clinical evidence of asbestos exposure).

fliction of emotional distress.[11] Moreover, there would be no requirement of any physical manifestation of injury.

B. Under *Buckley* Many Perfectly Healthy Railroad Employees Will Have FELA Claims Despite the Fact That They Will Never Become Ill

The unprecedented holding in *Buckley* will have significant consequences for the railroad industry. Although asbestos has not been generally used in the railroad industry for years, rail employees continue to bring large numbers of FELA claims alleging injury from exposure to asbestos, since the latency period before manifestation of disease, if it occurs at all, can be up to 40 years. Since 1990, over 14,000 new asbestos claims have been brought against American railroads.[12] In many of these cases the plaintiff, in fact, suffers no disease, or at least not one caused by exposure to asbestos. Nonetheless, all of these plaintiffs have alleged exposure.

If *Buckley* is allowed to stand, it will not matter if an employee exhibits any disease or symptoms or if there is any medical evidence of exposure. He or she will only need to allege "massive" exposure. Further, it is likely that employees who have not made claims heretofore, because they are not injured, will consider actions based on the *Buckley* ruling. Under *Buckley*, whether or not they have symptoms, these employees would all be in a position to assert that the railroad is liable for damages for emotional distress they suffer over the prospect of future illness. There would be no need to demonstrate even the slightest present health effects caused by their alleged exposure. While the facts surrounding those alleged ex-

[11] Buckley's doctor quantified the increased risk of cancer at one to three percent. 79 F.3d at 1341.

[12] Data on the number of occupational claims have been supplied to AAR by its large member railroads.

posures may be different, the Second Circuit's legal analysis provides no way to distinguish Buckley's exposure from the exposure of other rail employees.

Nor does anything in *Buckley* limit its holding to asbestos exposure. Many hundreds of additional FELA cases have been brought alleging exposure to other substances, which at some point have been alleged to cause injury. Since 1990, over 2000 FELA claims have been filed alleging exposure to various toxic substances (other than asbestos).[13] Some of the more common examples include: diesel exhaust, *see e.g., Summers v. Missouri Pacific R.R. Co.*, 897 F.Supp. 533 (E.D. Okl. 1955); silica dust, *see e.g., Wooden v. Missouri Pacific R.R. Co.*, 862 F.2d 560 (5th Cir. 1989); and chemical solvents, *see e.g., Ulfik v. Metro North Commuter R.R.*, 77 F.3d 54 (2nd Cir. 1996); *Claar v. Burlington Northern R.R. Co.*, 29 F.3d 499 (9th Cir. 1994).[14] In fact, as the rail industry becomes a safer place to work, FELA claims alleging traumatic injury are fast being replaced by claims alleging an occupational illness, usually brought about by some alleged long term exposure to a deleterious environmental condition.

Given *Buckley*'s expansive and standardless ruling, these rail employees too would be in a position to bring emotional distress claims, and get them to a jury, simply

[13] *See supra* note 12.

[14] There is certainly controversy and dispute over whether the substances which form the bases for the recent wave of FELA exposure claims do, in fact, cause disease. In many jurisdictions evidence, even if not generally accepted in the medical and scientific community, might be proffered even if it would not be admissible under the standards established by this Court in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993). Since plaintiffs may bring and maintain FELA suits in state court, *see* 45 U.S.C. § 56 and 28 U.S.C. § 1445(a), this Court's decision in *Daubert*, which held that under Federal Rule of Evidence 702 expert testimony must be both reliable and relevant, might not necessarily act as a limitation on the kinds of evidence that may be submitted.

by alleging some degree of exposure to some substance allegedly linked to increased risk of disease, though the overwhelming majority of these employees are perfectly healthy, and will remain so. The *Buckley* decision does not require that there be anything other than a deminimis increased risk that the plaintiff will ultimately contract a disease as a result of the exposure.[15] *Buckley* would support awarding damages for emotional distress to numerous rail employees who testify that they are angry and upset as a result of alleged exposure to a substance in the workplace, which, through some medical testimony, can be linked to the possibility of some future disease.

If *Buckley* is overturned, any of these employees who do eventually develop an illness that can be causally linked to workplace exposure will not be deprived of a remedy. They would then have a cause of action under FELA, and would be able to recover all damages suffered, both for physical and mental injury. For example, since 1990, the railroad industry has paid out about $135 million to employees claiming to suffer from asbestos related disease.[16] *Buckley*, however, gives the vast majority, who will never becomes ill, the same right of access to damages.

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[15] *See supra* note 11.

[16] *See* CLAIM AND LITIGATION REPORT (calendar years 1990-1995).

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the judgment of the Court of Appeals for the Second Circuit in this case should be reversed.[17]

Respectfully submitted,

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[17] While AAR has addressed only Buckley's claim for negligent infliction of emotional distress, AAR fully supports Petitioner's position that medical monitoring is not available as a remedy under FELA. (*See* Pet. Br. at point IV).